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CITATIONS

739741—47

In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 1191

THE GARLOCK PACKING COMPANY, PETITIONER

v.

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 31–33) is unreported. The opinions rendered by the Circuit Court of Appeals (R. 40–45) are reported at 159 F. 2d 44.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on January 16, 1947 (R. 45). The petition for certiorari was filed on April 2, 1947. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended.

QUESTION PRESENTED

Whether "wage premiums" or bonuses regularly paid employees over a period of years pursuant to a promulgated plan constitute a part of the regular rate of pay within the meaning of Section 7 (a) of the Fair Labor Standards Act.

STATUTE INVOLVED

Section 7 (a) of the Fair Labor Standards Act of 1938 (c. 676, 52 Stat. 1060, 29 U. S. C. 201) provides that

> No employer shall * * * employ any of his employees who is engaged in commerce or in the production of goods for commerce—
>
> * * * * *
>
> (3) for a workweek longer than forty hours * * * unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

STATEMENT

This action was instituted by the Administrator of the Wage and Hour Division, United States Department of Labor, under Section 17 of the Fair Labor Standards Act to enjoin petitioner from violating the overtime provisions of the Act (R. 3–6). Petitioner is engaged in the production, sale and distribution of mechanical packings within the coverage of the Act (R. 3, 7, 13, 30). In June 1937, its board of directors adopted a

plan for the payment of "wage premiums" to its hourly rate employees under which imaginary shares of stock are assigned to employees in proportion to their years of service (R. 11, 29). Five imaginary shares are assigned for each of the first and second six months of employment, and thereafter five shares are assigned for each additional year up to a maximum of 50 shares for nine years (R. 16). When cash dividends are declared on company stock, a "wage premium" is paid as a dividend on the imaginary stock (R. 11). The wage premiums vary in accordance with the amount of the cash dividend declared but "in actual fact there was substantial regularity in the dividend rate" (R. 43). Only employees who worked forty hours or more per week received the full bonus payment; employees who worked less than forty hours received a proportionate share (R. 16, 41). Premium payments have been made to employees at regular quarterly intervals since the plan first became effective in 1937 (R. 12, 29). Pursuant to the plan more than $50,000 in wage premiums have been paid each year since 1939 (R. 41).

New employees are informed of the plan when they are hired (R. 12, 29). The employees "look forward to and expect to receive this wage premium," they assume that "at the expiration of each quarter the payments provided for will be made to them," and regard the "wage pre-

miums" received under the plan as part of their regular compensation (R. 26, 30). Petitioner has deducted social security and withholding taxes from the wage premium payments and has treated the premiums as a labor cost in computing its production costs and its income tax returns (R. 12, 13, 30). The wage premium payments, however, have not been included in the regular rate in calculating overtime compensation (R. 13, 30).

Applying the principle that the regular rate must reflect all compensation which the parties have agreed shall be paid for the non-overtime workweek, the court below held that the premium payments were part of the regular rate (R. 42). It stated that "wage payment plans having the same purpose and effect" were involved in *Walling* v. *Harnischfeger Corp.*, 325 U. S. 427, and *Walling* v. *Youngerman-Reynolds Hardwood Co.*, 325 U. S. 419, and held that petitioner would enjoy an unwarranted advantage over competitors in labor costs if the bonus payments were not included in the regular rate of pay (R. 44).

ARGUMENT

The decision below correctly applies the rule that all payments regularly received for non-overtime work even if they are "only a part of the normal weekly income must * * * be an ingredient of the statutory regular rate." *Walling* v. *Harnischfeger Corp.*, 325 U. S. 427, 431. As in

the *Harnischfeger* case, the employees here "receive regular though fluctuating amounts for work done during their non-overtime hours in addition to their basic hourly pay" so that "such bonuses are a normal and regular part of their income." *Id.* at 430, 432. Under well-settled principles, such regularly earned compensation must be reflected in the regular rate. *Walling* v. *Helmerich & Payne,* 323 U. S. 37; *Walling* v. *Youngerman-Reynolds Hardwood Co.,* 325 U. S. 419; *Walling* v. *Harnischfeger Corp., supra.*

Neither the form of the compensation as a wage premium or bonus, nor the manner in which the bonus is computed, alters the decisive fact that it is regularly paid for non-overtime work. Bonus payments consistently have been held to constitute a part of the regular rate, whether in the form of a piece work incentive bonus (*Walling* v. *Harnischfeger Corp.,* 325 U. S. 427, 431; *Walling* v. *Stone,* 131 F. 2d 461 (C. C. A. 7)), a profit-sharing bonus (*Walling* v. *Wall Wire Products Co.,* 6 W. H. Cases 718 (C. C. A. 6, 1947)), a lump sum addition to base pay (*Carleton Screw Products Co.* v. *Walling,* 126 F. 2d 537 (C. C. A. 8)), or a predetermined percentage of base pay (*Walling* v. *Harnischfeger Corp., supra,* at 430; *Walling* v. *Richmond Screw Anchor Co.,* 154 F. 2d 780 (C. C. A. 2), certiorari denied 328 U. S. 870). The decision below, therefore, is in accord with decisions of this Court, as well as with all the decisions

of the circuit courts of appeals and the interpretation of the Administrator.[1]

CONCLUSION

The decision below is correct, and there is no conflict. The petition for certiorari should be denied.

Respectfully submitted.

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APRIL 1947.

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[1] The Administrator's interpretation, originally announced in 1941 (1942 Wage Hour Man. 134), is reprinted in the Appendix to this brief. Petitioner's statement that the decision below conflicts with the Administrator's interpretation is not supported either by the release embodying his interpretation or by the informal statement quoted by petitioner without citation. As the court below found, petitioner's bonus payments were made pursuant to a formalized plan or arrangement which the release makes clear are considered by the Administrator to be a part of the regular rate.

APPENDIX

For Release Monday,
February 5, 1945

U. S. DEPARTMENT OF LABOR
Wage and Hour and Public Contracts Divisions
165 West 46th Street
New York, New York

BONUS PAYMENTS

A summarization of the position of the Wage and Hour and Public Contracts Divisions with regard to the inclusion of "bonus" payments in computation of "regular" or "basic" rates of pay for overtime purposes under the Fair Labor Standards Act and the Walsh-Healey Act was issued today by L. Metcalfe Walling, Administrator of the Wage and Hour and Public Contracts Divisions. This statement was prompted, the Administrator said, by numerous inquiries from employees and employers requesting clarification of the principles followed by the Divisions in applying the overtime requirements of these acts to situations where "bonus" payments are distributed by employers to employees who work overtime.

Mr. Walling's statement follows:

"Under the Fair Labor Standards Act and the Walsh-Healey Act overtime compensation is payable to employees at rates not less than one and one-half times their 'regular' rates as provided in the Fair Labor Standards Act or 'basic' rates as

provided in the Walsh-Healey Public Contracts Act. The 'regular' rate of pay has been defined by the United States Supreme Court in recent decisions as 'the hourly rate actually paid for the normal, nonovertime workweek.' The court has also made it clear that no distinction or discrimination based on the method of employee compensation should be made in applying the provisions of the Fair Labor Standards Act. These decisions support, with respect to both acts, the Divisions' views, as announced in releases R–1548 and R–1548 (a), dated September 2, 1941. As stated in these releases, where an employee's 'regular' or 'basic' rate of pay is increased by the payment to him of a 'bonus,' additional overtime compensation must be paid for those workweeks in the bonus period when overtime was worked, unless provision is made for the inclusion of such overtime compensation in the 'bonus' payment itself by calculating it on a percentage-of-total-earnings basis.

"Releases R–1548 and R–1548 (a) define the type of 'bonus' which affects the regular rate of pay and describe how such 'bonuses' are to be included in computing the regular rate and the overtime compensation due under the Fair Labor Standards Act. The same rules are applied under the Walsh-Healey Public Contracts Act. These releases, which express the official position of the Divisions with respect to bonus payments, state:

There are two general categories in which bonus plans fall: A. In bonus plans of the first category, the payment and the amount of the bonus are solely in the discretion of the employer. The sum, if any, is determined by him. The employee

has no contract right, express or implied, to any amount. This type of bonus is illustrated by the employer who pays his employees a share of the profits of his business or a lump sum at Christmas time without having previously promised, agreed or arranged to pay such bonus. In such case, the employer determines that a bonus is to be paid and also sets the amount to be paid.

Bonus payments of this type will not be considered a part of the regular rate at which an employee is employed, and need not be included in computing his regular hourly rate of pay and overtime compensation.

B. In bonus plans of the second category the employer promises, agrees or arranges to pay a bonus. The amount to be paid may be fixed or may be ascertainable by the application of a formula. An example of this type of plan is a production bonus based on the excess over a minimum quota which the individual, the group, or the plant, produces in a period of time. Closely akin is a bonus which is paid for performing work in less than an established standard time and also a bonus which is paid when certain types of merchandise are sold through an employee's efforts. Other kinds of bonuses falling within this group are bonuses distributed in a certain amount or on the basis of a fixed percentage of the profits of the employer or of his gross or net income. There are many variations and refinements of plans within this category. For example, the amount of the payment may vary according to the length of service of the employee, his production or compensation; the earnings, production or compensation of the group of em-

ployees with which he works; the sales or net or gross income of the employer; or it may be contingent upon his continuing in the employ of the employer until the time the payment is to be made.

Bonus payments of this type will be considered a part of the regular rate at which an employee is employed, and must be included in computing his regular hourly rate of pay and overtime compensation.

"Many employers have been troubled by retroactive allocation of a 'bonus' where it was distributed less frequently than at the regular pay periods. This difficulty can easily be avoided. No additional overtime compensation need be computed and paid on a bonus, the amount of which is in fact arrived at by taking a predetermined percentage of the total earning of the individual employees (both straight time and overtime), exclusive of the 'bonus'. Where the amount paid to each employee is actually based on a percentage of his total earnings, the 'bonus' itself includes the payment of both straight time and overtime.

"The degree of frequency with which a bonus is paid is a factor which the Divisions have always considered in determining whether it should be included in the 'regular' or 'basic' rates of pay for overtime purposes. As an enforcement policy to be followed in the absence of authoritative rulings by the courts, the Divisions will in the future not insist on the inclusion of any bonus (except where there is obvious evasion of the overtime requirements) which is paid at greater intervals than quarterly in computations

of the 'regular' or 'basic' rate of pay for overtime purposes, even though the bonus would otherwise be of a type requiring such inclusion. Such considerations as the recognized bookkeeping difficulty confronting employers in allocating a bonus paid less often than once each quarter to the hours in which the bonus was earned, the time-consuming burden placed upon the inspection staff when confronted with the task of making such allocations and the benefit to employees of having a current knowledge of the hourly rate upon which their overtime will be calculated motivate this administrative policy.

"This enforcement policy, of course, does not and cannot affect the independent right of employees under section 16 (b) of the Fair Labor Standards Act to bring their own suits to recover wages that are due them."

U. S. GOVERNMENT PRINTING OFFICE: 1947